No. 91-948

In The
Supreme Court of the United States
October Term, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,

Petitioners,

v.

CITY OF HIALEAH,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE*

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INTEREST OF THE AMICUS CURIAE

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that has, over the past quarter century, represented the interests of America's Orthodox Jewish Community before courts, legislatures, and other governmental bodies.[1] COLPA has filed *amicus curiae*

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[1]COLPA has represented the full range of major national rabbinic, congregational and educational organizations within the Orthodox community. These include, and this *amicus* brief is submitted on behalf of,

a. Agudath Harabonim of the United States and Canada;
b. Agudath Israel of America;
c. National Council of Young Israel;

briefs in this Court in many of the leading religious freedom cases decided since COLPA's formation. COLPA files this brief because the particular subject of this litigation and its broad constitutional implications raise issues of great consequence to many Americans of the Jewish faith.

The most immediate practical consequence is that affirmance by this Court of the court of appeals' judgment could jeopardize the availability of kosher food in the United States. Meat and poultry is kosher only if derived from an animal slaughtered in accordance with rabbinic requirements that have been obligatory upon Jews for more than two thousand years—*i.e.*, by the prescribed Jewish ritual method of *shehitah*.[2] The Federal Humane Slaughter Act of 1958 (7 U.S.C. §1902(b)) unequivocally recognizes *shehitah* as a humane method of slaughtering

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d. The Rabbinical Alliance of America;
e. The Rabbinical Council of America;
f. Torah Umesorah, National Society of Hebrew Day Schools;
g. The Union of Orthodox Jewish Congregations of America; and
h. The Union of Orthodox Rabbis of the United States and Canada.

[2]*Shehitah* is a method of slaughter whereby an animal's carotid arteries are suddenly severed with a sharp knife. In *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y.), *aff'd*, 419 U.S. 806 (1974), a three-judge district court (including Circuit Judge Henry J. Friendly) upheld the constitutionality of the provision of the Federal Humane Slaughter Act, 7 U.S.C. §1902(b), that recognizes *shehitah* as complying with federal public policy. The court said (374 F. Supp. at 1291; footnotes omitted):

> Congress considered ample and persuasive evidence to the effect that the Jewish ritual method of slaughter, and the handling preparatory to such slaughter, was a humane method. . . . Jewish ritual slaughter, as a fundamental aspect of Jewish religious practice, was historically related to considerations of humaneness in times when such concerns were practically nonexistent.

animals for food and rejects the canard that *shehitah* is inhumane. Florida law similarly preserves the right to practice *shehitah* in language that tracks the Federal Humane Slaughter Act. *See* Fla. Stat. Ann. §828.23(7)(b).

The ordinances at issue in this case do not involve or affect Jewish ritual slaughter. But there are those—including the respondent's expert trial witness—who favor prohibiting or restricting *shehitah*. And if a state or a municipality were persuaded by those interests to prohibit or restrict *shehitah*, such a law likely would be defended against constitutional challenge on some of the same grounds invoked here to support Hialeah's ordinances. It is staggering to think that in this nation, founded as a refuge from religious persecution, the availability of kosher meat could or would be restricted or inhibited. An affirmance of the decision below would raise that frightening specter.[3]

A broader basis for our concern relates to the general constitutional principles that govern the outcome of this case. Jewish communal agencies—particularly Orthodox organizations that promote Jewish adherence to religious observance and ritual—are still reeling from this Court's wholly unexpected decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). Many centuries-old observances of the Jewish faith have been placed in jeopardy by

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[3]It is noteworthy that among the very first anti-Jewish laws enacted by the Nazi regime under Adolf Hitler were laws outlawing *shehitah* on the ground that it was cruel to animals. On April 21, 1933, Hitler, as the new Chancellor of the Third Reich, signed a decree (a) abrogating a 1917 German law that had permitted *shehitah* and (b) prohibiting the slaughter of animals without prior stunning that would render them unconscious. *See* Lewin, Munk & Berman, *Religious Freedom: The Right to Practice Shehitah*, pp. 15, 73-77 (1946).

Smith's surprise declaration that a "valid and neutral law of general applicability" may constitutionally override a mandated religious observance even in the absence of any "compelling governmental interest."

While we are dismayed at the Court's *Smith* decision and fervently hope that the Court will reconsider and/or limit that ruling, the decision below is erroneous and must be reversed even under *Smith's* looser constitutional standard. The ordinances challenged in this case are not, like Oregon's drug laws, applicable across-the-board to all persons within the jurisdiction. Hialeah's animal sacrifice prohibitions are narrowly focused legislation, plainly aimed at a distinctive group that is identified by its adherence to a particualr religious doctrine. The constitutional latitude *Smith* afforded local legislation that inhibits religious practices should not apply to laws, even if technically "neutral" on their face, that plainly are directed at readily identifiable religious minorities.

Further, Hialeah's ordinances are not "neutral" laws within the meaning of *Smith*. The municipality's resolutions and ordinances distinguish between conduct that is permitted and conduct that is forbidden on the basis of the actor's religious motivation. Residents of Hialeah are at liberty to kill animals for wholly secular reasons, but they may not do so when the same form of killing is done for "public ritualistic animal sacrifices" (City of Hialeah Resolution No. 87-90), for "any type of ritual" (City of Hialeah Ordinance No. 87-52), or "in a public or private ritual or ceremony" (City of Hialeah Ordinance No. 87-71). This is, therefore, the archetype of laws that prohibit conduct "engaged in for religious reasons, or only because of the religious belief that they display." *Employment Division v. Smith*, 494 U.S. at 877. The ordinances

must thus be invalidated even if the new doctrine announced in the *Smith* majority opinion is given an expansive reading.

Under this analysis, adopted by the majority in *Smith*, it is irrelevant whether there is a compelling governmental necessity to prohibit the conduct that is the subject of the ordinances. If discrimination between secular and religiously motivated conduct is established, a law that punishes only the latter is *ipso facto* constitutionally void.

We conclude this *amicus* brief on a note of foreboding. Reversal of the decision of the courts below on the grounds we have described would do little to mitigate the harm done to the freedom of religious minorities by *Smith*. Nor can reversal on the formalistic grounds described above be taken as proof that, even after *Smith*, there is real vitality left in the Free Exercise Clause. A constitutional rule that conditions the legitimacy of a statute on whether it *explicitly* treats religious observances differently from identical conduct engaged in for secular purposes is a flimsy shield for the freedom of religious observers. With little sophistication, legislatures may draft laws that prohibit or restrict religious practices in "neutral" terms, avoiding specific reference to "ritual" or "ceremony." The ultimate test of such legislation must be its actual impact on religiously motivated conduct. If it inhibits any observance of one's faith, an exemption should be constitutionally prescribed unless granting such an exemption would unduly interfere with the realization of an important governmental objective.

ARGUMENT

I.

THE HIALEAH ORDINANCES ARE SPECIFICALLY DIRECTED AGAINST RELIGIOUS PRACTICE AND ARE UNCONSTITUTIONAL UNDER *EMPLOYMENT DIVISION v. SMITH*

A. The Hialeah Ordinances Are Not "Generally Applicable Regulatory" Laws.

This Court's decision in *Employment Division v. Smith* held that an individual could claim no constitutional exemption, on grounds of his religious tenets, from a "neutral, generally applicable regulatory law" (494 U.S. at 880) that governs the conduct of all other persons. The majority opinion referred to the fact that Oregon's drug-control statute was an "across-the-board criminal prohibition," 494 U.S. at 884, and repeatedly defined its newly articulated constitutional guideline as applicable to claimed exemptions from "generally applicable" laws. *See* 494 U.S. at 878, 879, 880, 881, 882, 884, 885. The Court also emphasized "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct" (494 U.S. at 885)—government activity that should be given broad latitude.

Hialeah's ordinances can stake no claim to being laws of "general applicability." The district court found that the Hialeah City Council enacted the ordinances "in a mob atmosphere" (Pet. App. A27) "[j]ust after the Church began to organize and to prepare the [church] . . . for occupancy" (Pet. alp.; A22). *See also* Pet. App. A38 ("Defendant acknowledges that the challenged ordinances

arose in response to the opening of Plaintiff Church in the City."). Hialeah's ordinances cannot be described as laws imposed "across-the-board" to meet a broad societal need because the entire "board" covered by Hialeah's ordinances consists of the petitioners.

The district court acknowledged that Hialeah's "ordinances are not religiously neutral" (Pet. App. A23) and that "the evidence established . . . that the council members' intent was to stop the practice of animal sacrifice in the city" (Pet. App. A28). The district court nonetheless upheld the ordinances -- and the Eleventh Circuit affirmed -- on the unprecedented theory that "nothing in the First Amendment prevents a municipality from specifically regulating such conduct when it is deemed inconsistent with public health and welfare." Pet. App. A40.

The decisions of this Court on which the majority relied in *Smith* all involved legislation responsive to a broad societal need that was made uniformly applicable to *all* constituencies and was not enacted to restrict a particular group's religious exercise. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878) (criminal laws against polygamy); *United States v. Lee*, 455 U.S. 252 (1982) (mandatory payment of social security taxes); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor laws); *Gillette v. United States*, 401 U.S. 437 (1971) (military selective service regulations).

The Court's *Smith* opinion insulates only legislation of "general applicability," but condemns legislation that is "specifically directed at . . . religious practice" or has as its "object" the restriction of religious exercise. 494 U.S. at 878. By singling out a religious group or practice for special prohibition, the Hialeah ordinances epitomize the

sort of legislation that *Smith* disapproved. Religious believers do not, in such a case, incur "the incidental effect of a generally applicable and otherwise valid provision" (494 U.S. at 878). They are the exclusive targets of the criminal prohibition.

B. The Hialeah Ordinances Are Unconstitutional Because They Explicitly Prohibit Conduct When It Is "Engaged In For Religious Reasons."

This Court's majority opinion in *Smith* declared it to be "true . . . that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." 494 U.S. at 877. The series of Hialeah resolutions and ordinances involved in this case clearly fall within that constitutionally forbidden category.

(1) On June 9, 1987, Hialeah adopted Resoution No. 87-66 (Pet. App. A55), which was explicitly aimed at "certain religions" that "propose to engage in practices which are inconsistent with public morals, peace or safety." On the same day, the City Council adopted Ordinance No. 87-40 (Pet. App. A52), directed to "the potential for animal sacrifices." It is patent from both of these initial pronouncements that a religiously motivated practice was being singled out for official condemnation.

(2) On August 11, 1987, the City Council adopted Resolution No. 87-90 (Pet. App. A55-A56), which again expressed concern over "the possibility of public ritualistic animal sacrifices." The Resolution declared the City's policy "to oppose the ritual sacrifices of animals within the City of Hialeah, Florida" and the City's intent to pro-

secute any individual or organization "that seeks to practice animal sacrifice." The Resolution was not directed at objectively described conduct -- *i.e.*, the killing of animals in a particular manner. Rather, the language of the August 11 Resolution expressly limits the City's policy and its assurance of prosecution to "acts . . . engaged in for religious reasons." An individual who kills an animal for a reason other that "public ritualistic animal sacrifice" -- even if the killing is done by the very same method that is used for sacrifice -- is not subject to the City's policy or to the assurance of criminal prosecution.

(3) On September 8, 1987, the City Council adopted another ordinance, Ordinance 87-52 (Pet. App. A52-A53). Once more, it focused on "the possibility of public ritualistic animal sacrifices." The Ordinance defined "sacrifice" to mean "a public or private ritual or ceremony not for the primary purpose of food consumption," and it forbade possession of animals by "any group or individual that kills, slaughters or sacrifices animals *for any type of ritual*, regardless or whether or not the flesh or blood of the animal is to be consumed" (emphasis added).

Ordinance 87-52 applies, by its literal terms, only to possession that is incident to "any type of ritual." Possession of an animal by hunters, trappers, pet-owners, humane societies, veterinarians, research scientists, exterminators or taxidermists is not prohibited. Nor is there any restriction on possession of an animal that is to be killed for scientific purposes, for taxidermy, or even for sadistic enjoyment. Indeed, bare possession of an animal -- unaccompanied by additional conduct such as torture or killing -- is not otherwise illegal under Florida law. Under Ordinance 87-52, however, it is illegal for an individual or group that engages in animal sacrifice (*i.e.*, an individual

or group acting "for religious reasons") to keep an animal.

(4) On September 27, 1987, the Hialeah City Council adopted a final set of Ordinances -- Nos. 87-71 and 87-72 (Pet. App. A53-A54). The first explicitly refers to animal sacrifice, defined in terms customarily associated with religious observance -- killing an animal "in a public or private ritual or ceremony . . . ." The second Ordinance, No. 87-72, is the only one in the series of four Ordinances and two Resolutions that contains no explicit reference to ritual or ceremony. In the context of the five other official City pronouncements, however, there can be no doubt that Ordinance No. 87-72 is directed at conduct "engaged in for religious reasons."

The consequence of this series of Ordinances and Resolutions is that the killing of animals in Hialeah for ritual or ceremonial reasons is prohibited, while identical killing for secular reasons is permitted. That is an impermissible and unconstitutional form of discrimination under *Smith*. Regardless of the weight of the governmental justification for the ordinances, they may not be enforced by the City because enforcing them would be tantamount to prohibiting the free exercise of religion.[4]

[4]Even if a compelling governmental interest could justify legislation that is specifically directed against religious conduct—and there is no indication in *Smith* that it can—the City of Hialeah demonstrated no such compelling interest before the district court, least of all its purported interest in preventing cruelty to animals. *See infra* pp. 15-16.

II.

UNDER THIS COURT'S NEW *SMITH* STANDARD, EVEN THE MOST COMPELLING GOVERNMENTAL INTEREST IS IMMATERIAL ONCE IT IS SHOWN THAT THE LEGISLATION SINGLES OUT CONDUCT "ENGAGED IN FOR RELIGIOUS REASONS"

The standard announced in *Smith* asks whether the challenged governmental action bars conduct "only when . . . engaged in for religious reasons." Under this analysis it makes no difference how compelling the government's interest may be in prohibiting the religious practice. Even if it can be shown that a governmental interest of the greatest magnitude justifies a legislative prohibition, the law's distinction between conduct that has secular motivations and conduct that is prompted by religious conscience renders it invalid. The underlying theory is plain: If the legislative concern truly were compelling, the legislature should not limit the prohibition to acts "engaged in for religious reasons" and should extend the prohibition to the identical conduct when occasioned by secular motives.

In this respect, the new *Smith* standard tracks the constitutional standard customarily applied to Equal Protection challenges. If a statutory distinction in a criminal law is arbitrary or impermissible under the Equal Protection Clause, it makes no difference how compelling a governmental interest supports the prohibition. If the legislature has arbitrarily subjected a particularly defined class of persons or activity to prohibitions or restrictions that rationally should be applied to a larger universe -- *i.e.*, if the law is impermissibly underinclusive -- the narrow prohibition is invalid. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Police Dep't. of Chicago v. Mosley*, 408

U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). *Cf. Simon and Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991) (infringement on FIrst Amendment activity cannot be justified by a purported interest that government does not pursue in comparable secular contexts).

For this reason, once the Court determines -- as it must -- that Hialeah's ordinances draw an impermissible distinction between religiously motivated conduct and the same conduct engaged in for secular purposes, it is unnecessary for the Court to weigh Hialeah's governmental interest in prohibiting Santerian animal sacrifices. Even if Hialeah could justify an across-the-board prohibition on the killing of animals, it would be obligated to enact a neutral law that does not distinguish between the conduct as part of a "ritual," "ceremony" or "religion," and the same conduct undertaken as part of a secularly motivated course of action.

III.

THE *SMITH* STANDARD ELEVATES FORM OVER SUBSTANCE AND ENDANGERS RELIGIOUS FREEDOM

In the preceding pages, we have analyzed Hialeah's ordinances under this Court's new standard as articulated in *Smith*. The result -- invalidation of Hialeah's ordinances -- necessarily follows from an application of that standard, regardless of the harm inflicted on the residents of Hialeah by the animal sacrifice practices of the petitioners.

This analysis is deficient, however, because it emphasizes form and ignores substance. Had Hialeah more

cleverly drafted its Resolutions and Ordinances and not made specific reference to "ritual," "ceremony," or "religion," its legislation could have passed constitutional muster under *Smith*. Indeed, "neutral" laws having the identical effect could, under the *Smith* test, be adopted tomorrow by Hialeah or other municipalities. And, what is of paramount concern to this *amicus*, a state or municipality similarly could enact a law prohibiting Jewish ritual slaughter wihtout mentioning religion or ritual. A simple prohibition of the method of *shehitah* -- slaughter with a knife that severs the animal's carotid arteries -- would outlaw *shehitah* without appearing to distinguish between conduct that is "engaged in for religious reasons" and conduct that is secularly motivated.

If a legislature were to enact a law that would, in this manner, prohibit a central established tenet -- such as *shehitah* -- of a universally respected religion, and if there were no recourse in the courts against such official intolerance, the Bill of Rights' guarantee of the free exercise of religion would be reduced to sham and pretense. Such an event would shame the Founding Fathers, who envisioned this nation as a reliable refuge from religious persecution.

We recognize the concerns that the Court expressed in *Smith* and acknowledge, as the majority observed (494 U.S. at 883-84), that even while the Court paid lip service to the "compelling governmental interest" test, it frequently rejected Free Exercise claims outside the unemployment compensation context.[5] We believe,

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[5]The Court failed, however, in its *Smith* opinion to take account of the importance of retaining the "compelling governmental interest" standard to prevent discrimination against religious minorities on the many levels of government below this Court. No

however, that the reason for those rejections of claims made by conscientious religious observers is that the Court had been erroneously weighing overall governmental policy to determine whether the interest was "compelling," rather than evlauating the consequences to that interest of permitting an individual exemption. The Court noted in *Smith* that the "compelling government interest" test had been borrowed "from other fields" (494 U.S. at 885), and we agree that fitting that standard to the issue of constitutionally mandated religious exemptions presents difficulties. It is frequently true that a program of government regulation may be "compelling" or indispensable. Nonetheless, an individual exemption might be wholly benign and would not compromise the important government program in the slightest degree.

Accordingly, if this Court has finally determined to jettison the "compelling government interest" test in the area of free exercise of religion, we urge it to adopt a more substantive and meaningful standard for judging claims for individual exemptions from "neutral laws of general applicability." The test that gives appropriate weight to the governmental and to the individual interests must be one that turns on the effect of an individual exemption. Namely, will an exemption for the religious observer materially impede achievement of the important governmental objective sought by a neutral across-the-board

matter how unsuccessful the invocation of the "compelling governmental interest" test may have appeared in the *United States Reports*, it was respected by government bureaucrats and lower courts until it was eradicated by *Smith*. Many individuals who were threatened with wholly arbitrary and unjustified religious discrimination were significantly assisted by the pre-*Smith* requirement that any restriction of a religious observance had to be justified by a "compelling governmental interest." Since the decision in the *Smith* case, reasonable accommodations for religious observance by governmental personnel are much more difficult to achieve.

legal requirement? If so, the exemption, albeit based on a constitutionally protected right, should be overridden. If not, the Bill of Rights, with its guarantee for "free exercise" of religion, must prevail.[6]

Under this analysis, the "compelling government interest" test would be retained in only one context—that is, when a state or local law is aimed, in form *or in substance*, at the practices of a religious group, such that an exemption for the religious group would obviously swallow up the rule. Under our proposed constitutional standard (but not under the *Smith* standard), Hialeah's ordinances still could withstand constitutional attack if the Court were satisfied that the various interests enumerated in the district court's opinion (Pet. App. A42-A47) qualified as "compelling governmental interests."

It is our view, however, that none of the interests which Hialeah raised below justify the ordinances' restriction on religious practice. Were these interests truly compelling, Hialeah undoubtedly would have enforced these or similar ordinances in secular contexts -- something it has failed to do. In addition, this Court has required that legislation which inhibits free exercise must represent "the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). Hialeah has made no showing that its interests could not have been achieved through less restrictive means, such as by regulating the disposal of animal carcasses and remains and by preventing children below an appropriate age from witnessing animal sacrifice.[7]

[6] *See Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981) (exemption mandated unless it would "seriously affect" governmental interest); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

[7] The Court of Appeals, it should be noted, explicitly omitted the "welfare of children" factor from its bases for affirmance. Pet. App. A2.

This *amicus* takes particular exception with the district court's conclusion that the prevention of cruelty to animals is a compelling interest that overcomes religious convictions. Requiring a person to violate divine commands that govern his conscience is exceedingly "cruel" to a human being. A municipality's interest in preventing "cruelty" to an animal is, we submit, inadequate to justify perpetrating "cruelty" on sincere conscientious believers. While we are confident that any objective evaluation of Jewish ritual slaughter would arrive at the same conclusion that Congress reached in 1958 -- *i.e.*, that *shehitah* is a wholly humane method -- the future of *shehitah* in the United States should not depend on whether every state legislature or city council eternally agrees with this conclusion. If, by some miscalculation, a jurisdiction were to conclude otherwise, that judgment alone -- *i.e.*, that the method is "cruel" to animals -- should not override honestly held religious beliefs in a country where the "free exercise" of religion is among the first liberties specified in the Bill of Rights.

The outcome of a compelling interest analysis notwithstanding, the effect of *Smith* is to make those considerations irreievant. Under the constitutional test articulated in *Smith*, the Hialeah ordinances are constitutionally invalid because they are not "generally applicable" and because they single out religiously motivated conduct.

CONCLUSION

For the foregoing reasons, we urge the Court to limit *Smith* to its facts and to articulate a new constitutional standard that would provide greater constitutional protection for minority religious observance. Even if the Court elected to apply the new *Smith* standard, however, the Court should invalidate Hialeah's ordinances under the Free Exercise Clause.

Respectfully submitted,

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